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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 445.

BELLE J. BARNES, L. H. MANNING, AND EPES RANDOLPH, APPELLANTS,

vs.

J. L. B. ALEXANDER AND MARY E. STREET, EXECUTRIX OF WEBSTER STREET, DECEASED, APPELLEES.

BRIEF FOR APPELLEES.

POINT I.

The Judgment of the Court Below is Supported by the Findings of Fact Made by the Supreme Court of the Territory of Arizona.

The appellants claim that the appellees, who were the intervenors below, were not entitled to intervene in this litigation. This question in reality involves only the construction or interpretation of a local territorial statute upon a mere question of practice.

The subject of intervention in Arizona is regulated by

paragraph 1278 of the Revised Statutes of Arizona of 1901, which is as follows:

> "Any person who has an interest in the subject matter of the suit which can be affected by the judgment, may, on leave of the court or judge, intervene in such suit or proceeding at any time before trial."

This statute is identical with the former statute upon the subject, namely, paragraph 656 of the Revised Statutes of Arizona of 1887.

This latter statute has been construed by the Supreme Court of Arizona.

That court has held that the granting of the right to intervene is purely discretionary with the trial court.

London-Paris, etc., Bank vs. Abrams, 6 Ariz., 87, 90; 53 Pac., 588.

The rule repeatedly announced by this court is that the construction placed upon a local statute by a territorial Supreme Court will be adopted by this court and will not be disturbed in the absence of manifest error in such construction.

Sweeney vs. Lomme, 22 Wall., 208, 213.
Copper Queen Mfg. Co. vs. Arizona, 206 U. S., 474.
Kealoha vs. Castle, 210 U. S., 149, 153, 154.
Treat vs. Grand Canyon Ry. Co., 222 U. S., 448, 452.
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Santa Fe County vs. Coler, 215 U. S., 296, 305.
Albright vs. Sandoval, 216 U. S., 331, 339.
Sandoval vs. Randolph, 222 U. S., 161, 164.

There is no manifest error in the rulings of the court construing the statute quoted, from which it follows that as to this contention of the appellants the ruling of the court below must be affirmed.

But, inasmuch as this is an appeal from a judgment of the Supreme Court of a Territory, this court's jurisdiction is controlled and regulated by the act of April 7, 1874, chapter 80, 18 Stats., 27.

Under this statute this court has repeatedly held that its jurisdiction upon appeals taken under this statute is confined and limited to an inspection of findings of fact to see if the findings support the judgment, and to a review of the exceptions which were duly taken to the rulings of the trial court upon the admission and exclusion of evidence.

Young vs. Amy, 171 U. S., 179, 183.
Harrison vs. Perea, 168 U. S., 311, 323.
Mammoth Mining Co. vs. Salt Lake Machine Co., 151 U. S., 447, 450.
San Pedro, etc., Co. vs. United States, 146 U. S., 120, 131.
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Idaho, etc., Co. vs. Bradbury, 132 U. S., 509, 514, 515.
Eagle Mining Co. vs. Hamilton, 218 U. S., 513, 515.

An inspection of the findings of fact shows that they do support the judgment rendered.

It appears from the findings of fact made by the court below that the court found that—

1. For a number of years prior to November 10, 1904, William H. Barnes and John H. Martin were copartners, engaged in the practice of law at the city of Tucson, Pima County, Arizona, under the firm name of Barnes & Martin, each member of said firm being duly admitted to practice in all the courts of the Territory of Arizona.

2. From some time in 1902 until September 1, 1907, Webster Street and J. L. B. Alexander were attorneys at law, duly admitted to practice in all the courts of the Territory of Arizona and in the Supreme Court of the United States, and engaged in the practice of their profession at Phœnix, Arizona, as partners under the firm name of Street & Alexander.

3. In 1901 one Martin Costello, claiming to be the owner of the Roy and Leo mining claims, in Warren mining district, in Cochise County, Arizona, made application to the proper United States land office for a patent to those mining claims. The defendants Shattuck, Hanninger, and Marks were the owners of the Standard Quartz claim, and the defendant Shattuck and another were the owners of the Triangle and Iron Prince claims, which all conflicted with the Roy and Leo claims of Costello.

4. During the pendency of Costello's application for a patent for the Roy and Leo claims, the defendants Shattuck, Hanninger, and Marks employed the firm of Barnes & Martin as their atorneys, to file adverse claims against Costello's application for a patent on account of the conflict of the Roy and Leo claims of Costello with the Standard Quartz, Triangle, and Iron Prince claims.

5. Pursuant to such employment Barnes & Martin did cause to be filed in the said United States Land Office adverse claims against the issuance of the patent applied for by Costello, and thereafter, within thirty days, brought suits on behalf of Shattuck and the other claimants of the Standard Quartz, Triangle, and Iron Prince claims, in support of the adverse claims so filed to determine the right to the ground in controversy between the parties.

6. Three of such suits were brought, the basis of one suit being the conflict between Costello's claims and the Triangle claim, the suit being referred to in the record as the "Tri-

angle" suit, another the conflict with the Standard Quartz claim, referred to in the record as the "Standard Quartz" case, and the third the conflict with the Iron Prince claim, referred to in the record as the "Iron Prince" case. All these suits were brought in the District Court of Cochise County, Arizona, where the property was situated.

7. In the prosecution of these suits Barnes & Martin associated with themselves one J. M. O'Connell, an attorney at law, residing at Bisbee, in said Cochise County.

8. About the time of the commencement of said suits and while the same were pending, an agreement was made between Barnes & Martin and O'Connell, on the one hand, and Shattuck, Hanninger, and Marks, on the other, with respect to the compensation of said attorneys for their services in said suits. Such agreement was that the attorneys were to receive as their compensation one-fourth of all moneys or properties received by said Shattuck, Hanninger, and Marks as the result of the litigation or by way of settlement or compromise thereof.

9. Pursuant to such employment and agreement for compensation said Barnes & Martin and O'Connell did conduct said suits on behalf of said Shattuck, Hanninger, and Marks. The suit involving the conflict with the Triangle claim, known as the "Triangle" case, was tried, and judgment was rendered in favor of Costello. From such judgment an appeal was taken by Shattuck, Hanninger, and Marks to the Supreme Court of the Territory of Arizona. This appeal was heard, and on March 18, 1902, the opinion of the Supreme Court of the Territory of Arizona was delivered, reversing the judgment appealed from. Subsequently Costello filed a motion for a rehearing of said cause, claiming that the appeal should be dismissed for the reason that the appeal bond had not been filed within the time required by the statutes of Arizona, and the Supreme Court had consequently acquired no jurisdiction of such appeal.

10. While the appeal in the Triangle case was pending the suit involving the conflict with the Standard Quartz claim, and known as the "Standard Quartz" case was tried, resulting in a judgment in favor of Shattuck, Hanninger, and Marks and against Costello. From such judgment Costello prosecuted an appeal to the Supreme Court of the Territory of Arizona.

11. After the filing of Costello's motion for a rehearing of the Triangle case, and in the latter part of January, 1903, William H. Barnes, acting on behalf of the firm of Barnes & Martin, called upon the firm of Street & Alexander, at their office in Phœnix, Arizona, and engaged their services to oppose the motion for a rehearing of the Triangle case, and in the event of an adverse decision upon said motion to perfect an appeal to the Supreme Court of the United States from the judgment of the Supreme Court of the Territory of Arizona. The question of the compensation of Street & Alexander was orally discussed at that time, and an oral agreement made between said firm of Barnes & Martin by Mr. Barnes, the senior member of the firm, and the firm of Street & Alexander with respect thereto, the oral statement and proposition or offer of said Barnes being in the following language:

> "Now, I want you to attend to this case (referring to the Triangle case). I have to go back to New York. Now, if you will attend to this case, if you will agree to attend to this case, I will give you one-third of the fee which I have coming to me on a contingent fee from Shattuck, Hanninger, and Marks. Mr. O'Connell, who is associated with me, is entitled to the other third."

That judge Barnes, for the firm of Barnes & Martin, and Street & Alexander had several conferences relative to the contingent fee which Barnes & Martin were to receive from Shattuck, Hanninger, and Marks, in which Barnes told

Street & Alexander that the fee was one-fourth of whatever was realized from the prosecution of the case for Stattuck, Hanninger, and Marks, and told them that they, Street & Alexander, should get one-third of that, if they cared to take up and perfect the appeal and argue the case before the Supreme Court on the motion for the rehearing and perfect the appeal in the Triangle case, and that Street & Alexander agreed to do it, accepted his offer, and did the work. That the whole litigation turned upon this: That Costello was anxious to get a title to the claims and get the patent; and this proceeding was an adverse and delay in getting patent, and Judge Barnes wanted to hold this matter and force a compromise from him; that Barnes & Martin had but the one contract with Shattuck, Hanninger, and Marks for a contingent fee.

That Webster Street, one of the firm of Street & Alexander, thereafter argued the motion for rehearing in the Triangle case on behalf of Shattuck, Hanninger, and Marks. The motion for a rehearing of that case was granted by the court and the appeal was dismissed for the reason that the appeal bond was not filed in time, leaving the judgment appealed from in full force.

12. While the motion for a rehearing of the Triangle case was pending before the Supreme Court of the Territory of Arizona the appeal taken by Costello from the judgment in the Standard Quartz case came on for hearing before said Supreme Court, and was submitted upon printed arguments and briefs, at the January, 1903, term of that court. Street & Alexander, at the request of Barnes, made a formal announcement to said court, at the call of the calendar, that said case would be submitted on briefs, but performed no other services therein. The brief and argument on behalf of Shattuck, Hanninger, and Marks upon which said Standard Quartz case was submitted to said Supreme Court was prepared by Barnes, assisted by O'Connell.

13. After the granting of the motion for a rehearing of the triangle case and the dismissal of the appeal therein Street & Alexander prepared the petition for allowance of the appeal, presented the same and obtained the allowance of the appeal, prepared the assignments of error and statement of facts, prepared the bond on appeal, prepared the citation, and arranged and filed the same in the Supreme Court of Arizona, and had a transcript of the record transmitted to the Supreme Court of the United States, and took all the steps necessary to perfect such appeal. Except the argument of said motion for rehearing and the preparation of the papers on appeal to the Supreme Court of the United States, and the perfecting of such appeal, Street & Alexander performed no services in connection with any of the suits hereinbefore mentioned.

14. The appeal taken by Costello in the Standard Quartz case was submitted to the Supreme Court of the Territory of Arizona and was taken under advisement by the court. After the appeal to the Supreme Court of the United States in the Triangle case was perfected and while the appeal in the Standard Quartz case was under advisement by the Supreme Court of the Territory of Arizona, Costello and Shattuck, Hanninger, and Marks made a compromise settlement and adjustment of their differences and entered into a written contract of settlement as follows:

> "This agreement, made the 22d day of January, A. D. 1904, between Martin Costello and Mary Costello, his wife, of Tombstone, Arizona, parties of the first part, and L. C. Shattuck, H. R. Hanninger, and Emil Marks, of Bisbee, Arizona, parties of the second part, witnesseth:"

The agreement then recites the pendency of the appeal to the Supreme Court of the United States and to the Supreme Court of the Territory of Arizona in the two suits above mentioned and the desire of the parties to settle the litigation, and then provides that the parties of the first

part, in case of signing of stipulations for the dismissal of said appeals, agree to convey to the parties of the second part all their right, title, and interest in the Roy and Leo mining claims for the sum of $169,112, payable in certain instalments.

In consideration of which the parties of the second part agree that the appeals be dismissed.

The agreement further provides for the depositing of the deed in escrow, to be delivered upon payment of the amount above mentioned, and contains provisions with respect to the application of the proceeds of ores extracted pending the completion of such payment.

The agreement was signed and acknowledged by all parties and was recorded in the office of the county recorder of Cochise County.

15. Pursuant to this contract stipulations were made for the dismissal of the two appeals, and the same were dismissed, and the contract of settlement was fully carried out.

16. Subsequently Shattuck, Hanninger, and Marks received as the proceeds of the litigation and the compromise and settlement thereof the sum of $75,000, which was paid in installments. Of this amount one-fourth, or $18,750, was paid to O'Connell as the portion thereof to which Barnes & Martin and O'Connell were entitled under the agreement above mentioned. This amount was paid to O'Connell in installments, $1,250 being paid in June, 1904, $1,250 being paid in June, 1905, and the balance about November 1, 1906.

17. The copartnership of Barnes & Martin continued until November 10, 1904. On that day Barnes died testate. By his will Barnes devised and bequeathed all his property to his wife, Belle J. Barnes, the appellant. This will was subsequently probated, and in April, 1906, the estate was closed and the entire estate distributed to Mrs. Barnes. Sub-

sequently, and before the commencment of this action, Martin assigned his interest and that of the late firm in the contingent fee coming from said litigation, compromise, and settlement to Mrs. Barnes.

That before his death Judge Barnes went to Phœnix and notified Street & Alexander that a settlement was about to be effected in the Shattuck, Hanninger, and Marks cases.

That in 1905 both Martin and Mrs. Barnes were advised and had knowledge of the claim of Street & Alexander to one-third of the contingent fee.

That Street & Alexander did not file any claim against the estate of Barnes for the reason that they considered that the estate of Barnes owed them nothing, but that they had a one-third interest in the contingent fee itself.

18. That on October 23, 1907, Mrs. Barnes, as such devisee and assignee, brought this action against the defendants Shattuck, Hanninger, and Marks for an accounting and to recover one-fourth of all moneys and properties received by Shattuck, Hanninger, and Marks from said litigation and the compromise and settlement thereof, claiming that right thereto had vested in her under the distribution of the estate of Barnes and the assignment from Martin, and claiming that, in addition to money, certain stocks had been received in settlement of the litigation, and praying for a decree requiring the defendants to transfer and assign to her one-fourth of all stocks received by them.

19. The defendants answered, and while the suit was pending Street & Alexander filed a complaint in intervention, and obtained an order permitting them to intervene and to file their complaint in intervention, the complaint in intervention being drawn, signed, and sworn to by Webster Street. By this complaint they practically adopted Mrs. Barnes' complaint, alleged the agreement between themselves and Barnes and their right thereunder to one-third of the said contingent fee, and prayed an accounting between all

the parties to the action, and that they be decreed one-third of all moneys, properties, and stocks or whatever was paid, or by right ought to be paid, by Shattuck, Hanninger, and Marks to said Barnes & Martin and O'Connell.

20. While the suit was in this condition Webster Street died testate, and his will subsequently admitted to probate, and his widow, Mary E. Street, appointed executrix thereof; after her appointment as executrix Mrs. Street, as executrix, was substituted as an intervenor in place of Webster Street, deceased, by order of the court; an amended complaint in intervention was thereupon filed, differing from the original complaint in intervention only in the addition of allegations made appropriate on account of the death of Street and the substitution of his executrix.

21. Prior to the commencement of this action, and on June 17, 1905, O'Connell paid to Martin, as surviving partner of the firm of Barnes & Martin, $1,875 on account of the fee to be received by Barnes & Martin under the agreement therefor.

22. While the action was pending, and after the filing and service upon Mrs. Barnes and J. M. O'Connell of the original complaint in intervention, and while the cause was at issue but before trial, and on April 23, 1909, O'Connell paid to Mrs. Barnes the sum of $10,625, which, with the $1,875 paid to Martin and the $6,250 retained by O'Connell as his one-third, comprised the whole of the said contingent fee of $18,750, being one-fourth of all the moneys and property received by Shattuck, Hanninger, and Marks from said litigation and the compromise and settlement thereof.

These facts show that the intervenors had an interest in the subject-matter of the suit, and that such interest consisted in an ownership of a part of the subject-matter of the litigation.

Under such circumstances it is well settled that, irrespect-

ive of statute, the intervenors had a right to intervene in this cause.

Gulf C. & S. F. Ry. Co. vs. Eldredge, 80 S. W., 556.
Lewis vs. Harwood, 10 N. W., 586.
Yetzer vs. Young, 52 N. W., 1054.
McClurg vs. State Bindery Co., 53 N. W., 428.

The appellees in this case assert their equitable ownership to the extent of one-third of the subject-matter of the suit in which they successfully intervened, and claim that by reason thereof they became entitled to an equitable lien upon such subject-matter to the extent stated.

The suit was brought by the appellant Belle J. Barnes as being not in any representative capacity, but individually.

The will of her late husband, William H. Barnes, and an assignment from her husband's law partner, John H. Martin, constituted the source of her title to her cause of action. The subject of the litigation was the proceeds of the litigation in which during the lifetime of William H. Barnes he and his partner, Martin, had been retained by the defendants Shattuck, Hanninger, and Marks to render services as attorneys-at-law in connection with certain mining suits known among the parties as the "Triangle," the "Standard Quartz," and the "Iron Prince" cases.

The terms of employment were oral, and were that Barnes & Martin should have and receive from Shattuck, Hanninger, and Marks, as their compensation in and about such litigation, one-fourth of all money or property received by the said defendants as the result of such litigation or by way of settlement or compromise thereof. It appeared that the litigation instituted by Barnes & Martin, and conducted in part by them and in part by the intervenors, had resulted in a settlement or compromise, whereby Shattuck, Hanninger, and Marks received a large sum of money as the fruits of the services of Barnes & Martin and of the appellees.

The settlement took place on January 22, 1904, and was in substance that in consideration of the withdrawal of the suits referred to the defendants were to have an option upon

or right to purchase certain mining claims which were the subject of these suits for a price stated. Thereafter the defendants sold this right or option to a purchaser for $75,000 over and above the price they were required to pay for it, and later defendants began to make payments on account of the Barnes & Martin fee of one-fourth of $75,000, namely, $18,750.

No other payment was made until the following year, and in November, 1904, William H. Barnes died.

Thereafter, in October, 1907, this suit was brought to recover not only one-fourth of $75,000, but one-fourth of certain stock in the Shattuck-Arizona Copper Mining Company, which plaintiff alleged was received by defendants as part of the settlement and which she alleged to be of great value.

Thus it appears that in reality the object and purpose of the plaintiff's action was to establish her ownership of one-fourth of all the proceeds of the settlement still in the hands of the defendants, whether in money or property, and to impress thereon the equitable lien of her predecessors in interest to secure the payment thereof.

While it is true that plaintiff did not in terms demand such relief, such, nevertheless, was the necessary purport of her action. If she was not the equitable owner of one-fourth of the proceeds of the settlement by reason of the contract and fiduciary relation which existed between her predecessors in title and the defendants, upon what possible theory could the action have been maintained against the defendants in equity?

A simple contract between plaintiff's predecessors in interest and defendants surely would not support an equitable action for an accounting, and require defendants "to transfer and assign to plaintiff one-fourth of all the stock in said corporation received by them."

Plaintiff's right to an accounting was a mere incident of her real cause of action to establish her equitable ownership in one-fourth of the proceeds of the settlement and to secure its payment by impressing her lien thereon.

So that the subject-matter of the suit was *the fee of Barnes & Martin and the proceeds of the settlement out of which its payment was sought.*

With matters in this condition the appellees, in December, 1907, filed their original complaint in intervention, claiming to be entitled to one-third of the fee of Barnes & Martin, for the recovery of which this action was brought.

The intervenors claim that in January, 1903, William H. Barnes retained and employed them to render services in connection with the "Triangle" case in behalf of Shattuck, Hanninger, and Marks, in consideration of which Barnes gave the intervenors one-third of the fee, which, as Judge Barnes expressed it, "I have coming to me on a contingent fee from Shattuck, Hanninger and Marks."

It is not disputed that Judge Barnes had but one contingent fee "coming to him from Shattuck, Hanninger, and Marks," and that fee was one-fourth of the proceeds of the litigation instituted by him, in which the intervenors participated.

In determining the character of this agreement it is important that the mere words of the contract alone should not control in arriving at the intent of the parties thereto, but, as is proper in all such cases, due regard and consideration should be accorded to the relation and situation of the parties at the time the agreement was made, and to all of the circumstances surrounding and attendant upon the transaction.

When the agreement was made, in January, 1903, it appeared that Shattuck, Hanninger, and Marks, claiming to be the owners of the Triangle, Standard Quartz, and Iron Prince mining claims, had previously instructed Barnes & Martin to file adverse suits against the application of Costello for patents to the Roy and Leo mining claims, which conflicted with the claims of Shattuck, Hanninger, and Marks.

The "Standard Quartz" case had been tried and won by Barnes & Martin, and Costello was perfecting his appeal to the Supreme Court of the Territory.

The "Triangle" case had been tried, and had resulted in a judgment in the District Court of Cochise County in favor of Costello, although this suit disclosed this important fact, that the discovery monuments of the Roy and Leo mining claims were on the ground of the Standard Quartz mining claim.

The case had been appealed by Barnes & Martin to the Supreme Court of the Territory, and the judgment had been reversed, but thereafter, and before the filing of the remittitur, a motion was made by the appellee therein for a rehearing, upon the ground that the Supreme Court had no jurisdiction to decide the case because the appeal had not been filed within the required time, and upon this ground the Supreme Court dismissed the appeal.

Thus, with victory within his grasp, Barnes found himself confronted with a serious situation in the form of a judgment in favor of Costello, which, though it contained reversible error, stood unreversed.

He was on the verge of departure to New York, and consequently could not give the matter personal attention.

His associate, O'Connell, was engaged in looking after Costello's appeal in the "Standard Quartz" case. Obviously Barnes was in need of assistance which only a capable lawyer could render.

His only course seemed to be to resist the motion for a rehearing, and, in the event it was sustained, to appeal from the order thereon to the Supreme Court of the United States.

This he determined to do, and to carry out his purpose he sought the services of Judge Street and his partner, Mr. Alexander, one of the appellees upon this appeal.

The terms of the agreement made are thus stated by Mr. Alexander, which agreement was found to have been made by the Territorial Supreme Court:

> "* * * Finally Judge Barnes made this expression, 'Now, I want you to attend to this case. I have to go back to New York. Now, if you will attend to this case, if you will agree to attend to this case, I will give you one-third of the fee which I have

> coming to me on a contingent fee from Shattuck, Hanninger, and Marks. Mr. O'Connell, who is associated with me, is entitled to the other third.'"

And again the same witness states:

> "He (Barnes) said that that contingent fee (referring to the fee from the defendants) was one-fourth of whatever was realized from the prosecution of these cases that he had. He didn't say what the case was. I understood it, and I understood it at the time, that it was the whole matter * * * He said that they had this contingent fee coming from Messrs. Shattuck, Hanninger, and Marks, and that we should *get one-third of that* if we cared to take up and perfect the appeal and argue the case before the Supreme Court, the motion for the rehearing, and perfect the appeal in the 'Triangle' case, and we agreed to do it, accepted his offer, and did the work."

Barnes' expression that his fee "was one-fourth of whatever was realized," and his letter to Martin wherein he tells of Shattuck's statement upon his victory in the "Standard Quartz" case, saying, "He says we are to have one-fourth of the ground," clearly show that he or his firm was the equitable owner of one-fourth of the proceeds of the suits, just as his expression, "I will give you *one-third of the fee*" and that "we should get one-third of that," shows clearly the intention of the parties to *charge the subject-matter of the litigation* with the fee of the intervenors.

There certainly was no purpose or intent on Barnes' part to assume a personal liability to the intervenors for their fee, and the intervenors certainly did not seek to exact such an obligation.

The construction placed upon the agreement by the intervenors, always an important feature in determining the intent of the parties, as evidenced by the subsequent conduct of the intervenors, shows conclusively that they looked to the litigation alone for payment and not to the individual credit of Barnes & Martin for compensation.

Thus Mr. Alexander testified:

> "Judge Street and I did not file any claim against the estate of Judge Barnes. I did not consider that the estate of Judge Barnes owed us anything. I considered that I had an interest in this claim."

There was no personal liability upon Judge Barnes. He meant to, and did, confer upon the intervenors one-third of the contingent fee itself.

There was no agreement to pay personally in the future, no agreement to pay a sum equal to one-third, but an offer to give (presently, of course, although to be enjoyed in the future) one-third of the fee itself if the intervenors would agree to do certain things. They accepted the offer and fully performed its terms, and thereupon and thereby there was a completed, finished, and executed agreement which made the intervenors the equitable owners of one-third of the fee. In the words of Judge Earle, in *Harwood vs. La Grange*, 137 N. Y., 583:

> "That the agreement gave the plaintiff (the intervenors) an equitable lien or ownership as equitable assignees in the proceeds of the actions is not open to doubt. It has been so determined in many cases."

This ruling is supported by the following:

Fairbanks vs. Sargent, 104 N. Y., 108; 9 N. E., 870.
Fairbanks vs. Sargent, 117 N. Y., 380; 22 N. E., 1039.
Williams vs. Ingersoll, 89 N. Y., 108.
Boyle vs. Boyle, 106 N. Y., 654; 12 N. E., 709.
Thomas vs. N. Y. & G. L. R. R. Co., 139 N. Y., 179; 36 N. E., 880.
Chester vs. Jumel, 125 N. Y., 237; 26 N. E., 297.
Halmer vs. Evans, 129 N. Y., 140; 29 N. E., 233.
Wright vs. Wright, 70 N. Y., 98.
Ingersoll vs. Coram, 211 U. S., 365.
Wylie vs. Coxe, 56 U. S., 415; 15 How., 415; see 8 Wall., 214.

Louisville, etc., Ry. Co. vs. Wilson, 138 U. S., 501, 506, 507.
Walker vs. Brown, 165 U. S., 654, 664
Fourth St. Bk. vs. Yardley, 165 U. S., 634, 644.
Ketchem vs. St. Louis, 101 U. S., 306.
Cowdry vs. Galveston, 93 U. S., 352, 355.
Central R. R. vs. Pettus, 113 U. S., 116, 127, 128.
Semmes vs. Whitney, 50 Fed., 666.
Mahone vs. Southern Tel. Co., 33 Fed., 702; Appr. 138 U. S., 507.
Frink vs. McComb, 60 Fed., 486.
Smith vs. Young, 62 Ill., 210.
Cooke vs. Thresher, 51 Conn., 105.
Hoffman vs. Vallejo, 45 Cal., 564.
Blakey vs. N. Y. Life Ins., 28 Ind. App., 428.
Bogert vs. Adams, 8 Colo. App., 185.
Patten vs. Wilson, 38 Pa. St., 299.
Wilson vs. Seeber, 66 Atl., 909, 912.
Bank of New Hanover vs. Williams, 79 N. C., 136.
Gulf, C. & S. F. Ry. Co. vs. Eldredge, 80 S. W., 556.

Most of these cases involve the exact point under examination, viz., the effect of an agreement, oral or written, giving or agreeing to give an attorney a contingent interest in the proceeds of litigation. Some of the cases, such as *Fourth Street Bank vs. Yardley,* 165 U.S.,634,and *Ketchem vs. St. Louis,* 101 U. S., 306, are cited because the Supreme Court of the United States deemed the principles therein announced to be controlling in a case so nearly similar to the case at bar as *Ingersoll vs. Coram,* 211 U. S., 365. But all of the cases cited hold, either expressly or by necessary implication, that an agreement like that in the case at bar, made under similar circumstances, constitutes an equitable assignment of a part of the proceeds of litigation and entitles the equitable owner to an equitable lien upon such proceeds to secure the payment of his fee.

A minute examination of the following two cases cited

will suffice to show that the correctness of the position of the intervenors does not admit of doubt and is really not open to dispute. In *Harwood vs. La Grange,* 137 N. Y., 583 (32 N. E., 1000), La Grange, the attorney of record, employed Harwood, another attorney, to render services in connection with certain litigation. The terms of the agreement were that plaintiff was to receive a contingent fee, payable only in event of success, out of the proceeds of the litigation, and in deciding that the agreement made Harwood the equitable owner, and as such entitled him to an equitable lien to the extent of his claim upon the proceeds of the litigation in which he had engaged, the court used the language quoted above.

The New York cases cited have special strength and force in their application to the present controversy, because they all recognize the existence and correctness of the well-settled rule, which the appellant seeks to apply to this case, that ordinarily a mere agreement "to pay out of a particular fund, however clear in its terms, is not an equitable assignment of such fund."

Christmas vs. Russell, 14 Wall., 69, 84.
Trist vs. Child, 21 Wall., 441.
Wright vs. Ellison, 1 Wall., 16.

But the cases very properly hold that the rule has no application to cases like the present controversy, or else, as the Supreme Court of the United States held in *Ingersoll vs. Coram,* 211 U. S., 365, that "These conditions are satisfied in the case at bar."

This latter case, we respectfully submit, is conclusive upon the question under consideration. In that case the successor in interest of Robert J. Ingersoll claimed to be the equitable owner and to be entitled to a lien upon the proceeds of litigation to the extent of $100,000. The contract was simply an agreement that Ingersoll's fee, in the event of success, should be $100,000. It also provided that the defendant was not to be personally liable to Ingersoll except

to pay such fee out of the funds received from the estate of A. J. Davis; and yet the court held that Ingersoll was the equitable owner, and as such entitled to an equitable lien to the extent stated. The court said:

> "The sufficiency of the agreement of August 17, 1891, to create a lien seems not to have been seriously questioned in the circuit court upon the argument of the demurrer. However, the court said that 'Upon all settled rules with reference to the construction of such instruments we cannot doubt that this one of August 17, 1891, created a lien on the funds therein referred to in behalf of Mr. Ingersoll.'"

On the final hearing the effect of the instrument was contested, and the court adhered to its ruling, saying:

> "Whether or not the particular agreement creates a lien is a matter of construction. In this case the fact that there was no primary personal responsibility on J. A. Coram specially serves to stamp the agreement in issue as declaring a purpose to create a lien. Therefore, on the whole, we hold that, on this final hearing on bill, answer, and proofs, the bill must be sustained."

The conclusion of the court is sustained by other authorities.

In *Wylie vs. Coxe*, 15 How., 415, a contract was made with an attorney for the prosecution of a claim against Mexico to pay him a contingent fee of 5 per cent out of the fund awarded. It was held that the agreement constituted a lien upon the fund. In *In re Paschal*, 10 Wall., 483, in the letter retaining Paschal it was said that his compensation would depend upon the action of a future legislature, "unless a recovery is had in the suit, in which event I shall feel authorized to let you retain it out of the amount received." It was held that in accordance with the prevailing rule in this county Paschal had a lien on the fund in his hands for disbursement and professional fees. The case was cited in *McPherson vs. Cox*, 96 U. S., 404, 417, and the doctrine re-

peated. See also *Central Railroad vs. Pettus*, 113 U. S., 116; *Louisville, etc., Railroad Company vs. Wilson*, 138 U. S., 501, 507.

In *Walker vs. Brown*, 165 U. S., 654, it was held that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein described or identified, a security for a debt or other obligations, creates an equitable lien on the property so indicated. This was an application of the doctrine of *Fourth Street Bank vs. Yardley*, 165 U. S., 634, and *Ketchum vs. St. Louis*, 101 U. S., 306. These cases are not opposed by *Trist vs. Child*, 21 Wall., 441, and *Wright vs. Ellison*, 1 Wall., 16. In the latter case it is said that it is indispensable to the lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the debtor should be paid out of it. These conditions are satisfied in the case at bar.

In our opinion the distinction between this case and those cited by the appellant not only clearly appears from an examination of those cases, but is authoritatively announced in *Ingersoll vs. Coram*, 211 U. S., 365, 367, 368. The value of *Trist vs. Child*, 21 Wall., 441, which appellant regards as decisive of the case at bar, as an authority in the appellant's favor, is not enhanced by the fact that in that case the court held the contract with the attorney was illegal and void, because contrary to public policy. Moreover, the court held that there could be no assignment of a claim against the Government unless the Federal Statute cited was complied with. It was not pretended that the terms of the statute had been met. But the value of each of the authorities cited by appellant in its application to the case at bar is utterly destroyed by the decision in *Ingersoll vs. Coram*, *supra*.

We must therefore conclude that the intervenors were in fact equitable assignees of a one-third interest in the subject-matter of the litigation, and as such were entitled to,

and had an equitable lien upon, the proceeds of that litigation to the extent thereof.

It remains to be shown that the intervenors sufficiently alleged and proved such interest.

The complaint in intervention (fols. 20 to 39) set out all the necessary but formal allegations, and then clearly alleged the employment of the intervenors upon the terms already discussed, alleged full performance by the intervenors, and after asserting that they had an interest in the matter in litigation, which the facts alleged showed them to have, the intervenors, among other things, prayed "that they be decreed one-third of all moneys, property, stocks, or whatever was paid, or by right ought to be paid, to the said Barnes & Martin and the said J. M. O'Connell."

What else should have been alleged to entitle intervenors to the judgment which they recovered? Nor was the proof of the agreement and all the essential facts to support a recovery wanting. After proving the matters already discussed the intervenors proved that the plaintiff as assignee of the firm of Barnes & Martin had actually received as her share of the fee realized from said litigation, viz., $18,750, all thereof except the one-third retained by O'Connell. The complaint herein alleged that the whole of said fee was assigned to the plaintiff by John H. Martin individually and as surviving partner of the firm of Barnes & Martin, and that no part thereof was paid or delivered to William H. Barnes and John H. Martin as copartners or to either of them (fols. 12, 13, 14). True, there is evidence that a payment of $1,875 was made to John H. Martin, but it does not appear that such payment was not made by plaintiff's order or for her use and benefit.

However, as assignee of the interest or claim for attorney fees in the proceeds realized from said litigation the plaintiff took no other or greater rights or interest than the assignors themselves possessed, and therefore took subject to and charged with the interest and equity of the intervenors

therein, which the evidence and judgment establishes to have been the sum of $6,250.

The cases of *Gulf C. & S. F. Ry. Co.*, 80 S. W., 556, and *Louisville, etc., Ry. Co. vs. Wilson*, 138 U. S., 501, 506, 507, sufficiently establish the power and jurisdiction of the court to determine the rights of the intervenors and to award a judgment against the plaintiff for the amount found to be due. That judgment was correctly awarded to the intervenors against the plaintiff for the amount of $6,250 does not admit of doubt. It appears that plaintiff received the balance of the fee, viz., $10,625, on April 23, 1909, from O'Connell, and that prior to the commencement of the action John H. Martin duly assigned to her all the interest of the firm of Barnes & Martin in the fee in question. Thus the whole of the fee except the one-third which O'Connell deducted for himself was vested in and received by the plaintiff.

So soon as the intervenors heard that the litigation of Shattuck, Hanninger, and Marks had been settled, and long before O'Connell parted with the funds, they served notice of their claim upon O'Connell, demanded payment of $6,250 to themselves, and notified him that if he paid to any one else the intervenors would hold him responsible. And it appears that both Mrs. Barnes and Col. Martin were advised of the intervenors' claim as early as 1905; Martin heard of the claim in March or April, 1905. The original complaint in intervention was filed in December, 1907, and the answer of the plaintiff thereto was filed in July, 1908, more than nine months prior to the payment to her of the $10,625 stated. So that whatever the plaintiff received as the legatee of her husband or as assignee of the firm of Barnes & Martin necessarily came to her charged with the lien of the intervenors and impressed with the trust for their benefit, of which she had full notice and actual knowledge.

Thus it clearly appears that there is nothing whatever in the contention of the appellant to the effect that the judgment is excessive.

This court cannot review the question of the alleged excessive character of the judgment without an examination of the record to ascertain whether the facts found by the Supreme Court of the Territory are justified by the evidence. This court has repeatedly announced that it will not embark upon such an inquiry, but will confine itself to the limitations already specified.

Young vs. Amy, 171 U. S., 179, 185.
Bear Lake, etc., Irrigation Co. vs. Garland, 164 U. S., 1.

Many of the cases already cited announce the well-settled rule that attorneys, being equitable assignees of a fund or the proceeds of litigation charged with their lien, may pursue the subject of the lien wherever it may be found. The right to pursue the fund is elementary when it is found to be in the hands of a person who, like the plaintiff here, took the subject thereof with full notice and knowledge of the existence of the lien.

Hoffman et al. vs. Vallejo, 45 Cal., 564.
Templeton vs. Gresham, 60 Tex., 53.
Petticolas vs. Carpenter, 53 Tex., 23.

In the latter case the court said:

> "The subject-matter of the suit was sold pending the suit and the proceeds paid to the plaintiff in the cause, and yet it was held that the intervenors might follow the proceeds into his hands and have judgment against him for the amount of their respective claims. * * * This was because the court had jurisdiction of the subject-matter of the suit and power to adjust the rights of all who asserted an interest in it or its proceeds."

It follows from what has been said that the appellees were and are entitled to the judgment rendered by the court below, and that such judgment is supported by the findings of fact made by the Territorial Supreme Court.

Point II.

No Error in the Admission or Rejection of Evidence Was Committed by the Trial Court.

The fourth assignment of error submitted by the appellants endeavors to present the question of the competency of the witness Alexander to testify to conversations with the deceased husband of the appellant Belle J. Barnes, but this necessarily involves a construction of paragraph 2536 of the Revised Statutes of Arizona of 1901, which is as follows:

> "In an action by or against executors, administrators or guardians, in which judgment may be rendered, for or against them as such, neither party shall be allowed to testify against the others as to any transaction with or statement by the testator, intestate or ward unless called to testify thereto by the opposite party or required to testify thereto by the court; and the provisions of this section shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent."

This statute was construed by the Supreme Court of Arizona in *Goldman vs. Sawtello*, 7 Ariz., 23; 76 Pac., 696, in which case the court held that in overruling an objection to the competency of a witness the court "required" the witness to testify.

The witness Alexander was required to testify in this case (R., 62-63), and consequently, under the construction placed upon the statute in the case cited, there would be no question to review here upon such a ruling, assuming the question was otherwise reviewable.

But the record shows (R., 63) not even a ruling upon the objection made, and no exception to the admission of the evidence was in fact ever taken, notwithstanding the appearance of an exception in the statement of facts.

To review in this court questions relating to the admission or exclusion of evidence, an exception taken at the time the ruling was made is essential.

Nor is this inflexible rule in any way affected by section 15 of chapter 74 of the Laws of the Territory of Arizona of 1907, which provides that "the giving, refusing or modifying of instructions, and every part of the charge given to the jury, and all rulings, orders and actions of the court in a case, shall be deemed excepted to without formal exception and subject to revision by the Supreme Court for error without bill of exceptions."

Nor is the rule in any way relaxed even if it be true, as counsel for the appellant states on page 6 of appellant's answer to the motion to dismiss the appeal or affirm the judgment appealed from, where counsel say:

> "For years it has been the practice in Arizona under such statute not to except to rulings on questions of evidence."

It is obvious that this court's jurisdiction as regulated by the act of Congress already cited, cannot be, and is not, enlarged or in any way affected either by a mere territorial statute or by habitual laxity in the conduct of trial counsel in Arizona.

Apache County vs. Barth, 177 U. S., 538, 542.
Grayson vs. Lynch, 163 U. S., 468, 473.
Eagle Mining Co. vs. Hamilton, 218 U. S., 513, 515.
Young vs. Amy, 171 U. S., 179, 183.
Gonzales vs. Buist, 224 U. S., 126, 130.

Appellants further complain that the trial court erred in allowing proof of payments made to the appellant Belle J. Barnes after the filing of the appellees' complaint in intervention, and it is said that there were no pleadings to support the offer of such proof.

But the answer of the defendants to the complaint in intervention contains all the facts the proof of which the appellant objected to.

The intervenors, of course, had the right to avail themselves of an admission in the pleadings and to establish by proof an admission by defendants which adversely affected the plaintiff.

It is further claimed by appellants that the court erred in rejecting proof of what Costello and his attorneys said with reference to the weight to be given to the pending appeal to the Supreme Court of the United States in the "Triangle" case. This proposition cannot be maintained. In the first place, there is evidence in the case far more eloquent than anything Costello or his attorneys could have said, which shows conclusively that the services rendered by the appellees were in reality of the greatest value, and that the "Triangle" suit and its dismissal were of such importance and consequence in the settlement of the whole litigation that its discontinuance and withdrawal was made a condition precedent to the settlement of the entire controversy.

But it is immaterial whether the services rendered by the intervenors were of great or little value or of great or little importance. Where the fee to be paid is fixed by agreement, it can make no difference whether the performance involves much or little labor so long as the contract is performed.

Browder et al. vs. Long's Ex'r et al., 66 S. W., 600.

The quantity of the services rendered or what they accomplished has no bearing upon an agreement which fixes the price for a specified service.

But under no circumstances could the self-serving statements made by Costello or his attorneys in January, 1904, as to the importance or unimportance of the "Triangle" case in any way bind the intervenors and be competent even as bearing upon the probability of making the intervenors' contract in January, 1908.

The record shows that the testimony was not offered as bearing upon the question of probability.

It was offered solely in an attempt to show that in making

the settlement Costello paid no attention to the "Triangle" case.

As this court said in *Curtin vs. Benson*, 222 U. S., 85, "we cannot now extend the evidence beyond the special and limited purpose of its introduction."

But the alleged fact sought to be established was obviously immaterial, and the proof by which appellants sought to establish it utterly incompetent and inadmissible for such or any other relevant purpose. Nor is there any merit in appellants' claim that the trial court erred in excluding a telegram from Martin to Barnes which congratulated Barnes upon his success in the trial of the "Standard Quartz" case.

This, like the alleged statements of Costello and his attorneys as to the alleged unimportance of the "Triangle" case, is said to bear upon the probability of Barnes making the contract of employment with the intervenors. Since the Territorial Supreme Court found as a fact that the contract had been made, an inquiry at this time before this court as to the probability of its having been made is wholly irrelevant. No foundation whatever was laid for the introduction of this secondary evidence, but apart from that the evidence offered amounted to nothing. It was at best a mere expression of opinion by Martin, addressed to his partner, by which they sought to affect the rights of the appellees. Obviously, no judgment will be reversed because of the exclusion of a piece of evidence incompetent in itself and which could not possibly have affected the decision had it been admitted.

It is apparent that appellants were not prejudiced by any of the rulings made by the court, and that the undisputed evidence in support of the judgment, apart from the evidence involved in these rulings, was sufficient and ample to sustain it.

Point III.

For the reasons stated, the judgment of the lower court should be affirmed.

Respectfully submitted,

J. L. B. ALEXANDER,
WILLIAM M. SEABURY,
Attorneys for Appellees.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
Of Counsel.

[21108]

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 445.

BELLE J. BARNES, L. H. MANNING, AND EPES RANDOLPH, APPELLANTS,

vs.

J. L. B. ALEXANDER AND MARY E. STREET, EXECUTRIX OF WEBSTER STREET, DECEASED, APPELLEES.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

Motion.

Come now the appellees herein and move this honorable court to dismiss the appeal now pending herein, upon the ground that said appeal presents for review no question which this court has jurisdiction to consider, or in the alternative to affirm the judgment from which the appeal is taken, and if both motions be denied, to transfer the cause

to the summary docket of this court to the end that its determination may be expedited.

Respectfully submitted,

J. L. B. ALEXANDER,
WILLIAM M. SEABURY,
Attorneys for Appellees.

ALDIS B. BROWNE,
WILLIAM M. SEABURY,
J. L. B. ALEXANDER,
ALEXANDER BRITTON,
EVANS BROWNE,
Of Counsel for Appellees.

SIR: Please take notice that the foregoing motion will be submitted to the court, at the city of Washington, District of Columbia, on Monday, March 24, 1913, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Yours truly,

J. L. B. ALEXANDER,
WILLIAM M. SEABURY,
Attorneys for Appellees.

Dated at Phœnix, Arizona, February 17, 1913.

To Eugene S. Ives, Esq., Tucson, Arizona, attorney for appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 445.

BELLE J. BARNES, L. H. MANNING, and EPES RANDOLPH, *Appellants,*

vs.

J. L. B. ALEXANDER and MARY E. STREET, *Executrix of Webster Street, Deceased, Appellees.*

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

Statement.

This is a motion under Rule 6 to dismiss or affirm. The appeal pending is from a judgment of the Supreme Court of the Territory of Arizona, which affirmed a judgment for $6,250 in favor of appellees against appellant Belle J. Barnes, which judgment was rendered in the District Court of such Territory after a trial before the court without a jury.

Point I.

THIS COURT HAS NO JURISDICTION TO REVIEW ANY OF THE QUESTIONS PRESENTED BY THE ASSIGNMENT OF ERRORS.

This court's jurisdiction upon this appeal is fixed and regulated by the act of April 7, 1874, chapter 80, 18 Stat., 27. It has been held repeatedly that this court's jurisdiction, under this act is limited to an inspection of the findings of fact to see if the findings support the judgment rendered,

and to a review of exceptions which were duly taken to rulings of the trial court upon the admission or exclusion of evidence.

Young *vs.* Amy, 171 U. S., 179, 183.
Harrison *vs.* Perea, 168 U. S., 311, 323.
Mammoth Mining Co. *vs.* Salt Lake Machine Co., 151 U. S., 447, 450.
San Pedro, etc., Co. *vs.* United States, 146 U. S., 120, 131.
Apache County *vs.* Barth, 177 U. S., 538, 542.
Bear Lake Irrigation Co. *vs.* Garland, 164 U. S., 1, 18.
Grayson *vs.* Lynch, 163 U. S., 468, 473.
Haws *vs.* Victoria, etc., Co., 160 U. S., 303, 312, 313.
Stringfellow *vs.* Cain, 99 U. S., 610.
Neslin *vs.* Wells, 104 U. S., 428, 429.
Idaho, etc., Co. *vs.* Bradbury, 132 U. S., 509, 514, 515.
Eagle Mining Co. *vs.* Hamilton, 218 U. S., 513, 515.

An examination of the transcript of record and an inspection of the assignment of errors show that no question which this court has jurisdiction to consider is raised or presented for review.

Ten errors are assigned.

The first assignment and paragraph "a" of the sixth assignment question the sufficiency of the complaint in intervention, not to state a cause of action, but to entitle the intervenors to intervene in the litigation.

This question involves only the construction or interpretation of a local territorial statute upon a mere question of practice.

The subject of intervention in Arizona is regulated by paragraph 1278 of the Revised Statutes of Arizona, 1901, which is as follows:

> "Any person who has an interest in the subject matter of the suit which can be affected by the judg-

ment, may, on leave of the court or judge, intervene in such suit or proceeding at any time before trial."

This statute is identical with the former statute upon the subject, namely, paragraph 656 of the Revised Statutes of Arizona, 1887.

This latter statute has been construed by the Supreme Court of Arizona. That court has held that the granting of the right to intervene is purely discretionary with the trial court.

London-Paris, etc., Bank *vs.* Abrams, 6 Ariz., 87, 90 (53 Pac., 588).

The rule repeatedly announced by this court is that the construction placed upon a local statute by a territorial Supreme Court will be adopted by this court and will not be disturbed in the absence of manifest error in such construction.

Sweeney *vs.* Lomme, 22 Wall., 208, 213.
Copper Queen Mining Co. *vs.* Arizona, 206 U. S., 474.
Kealoha *vs.* Castle, 210 U. S., 149, 153, 154.
Treat *vs.* Grand Canyon Ry. Co., 222 U. S., 448, 452.
English *vs.* Arizona, 214 U. S., 359, 361, 363.
Fox *vs.* Haarstick, 156 U. S., 674.
Clason *vs.* Matko, 223 U. S., 646, 653.
Armijo *vs.* Matko, 181 U. S., 558, 561.
Santa Fe County *vs.* Coler, 215 U. S., 296, 305.
Albright *vs.* Sandoval, 216 U. S., 331, 339.
Sandoval *vs.* Randolph, 222 U. S., 161, 164.

There is no manifest error in the rulings of the court construing the statute quoted, from which it follows that these assignments present nothing for review.

The fourth assignment endeavors to present the question of the competency of the witness Alexander to testify to conversations with the deceased husband of the appellant Belle

J. Barnes, but this necessarily involves a construction of paragraph 2586 of the Revised Statutes of Arizona, 1901, which is as follows:

> "In an action by or against executors, administrators or guardians, in which judgment may be rendered for or against them as such, no party shall be allowed to testify against the others as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party or *required to testify thereto by the court;* and the provisions of this section shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent."

This statute was construed by the Supreme Court of Arizona in Goldman *vs.* Sotelo, 7 Ariz., 23 (60 Pac., 696), where the court held that in overruling an objection to the competency of a witness the court "required" the witness to testify.

The witness Alexander was "required" to testify in this case (R., 62, 63), and, consequently, under the construction placed upon the statute in the case cited, there would be no question to review here upon such a ruling, assuming the question was otherwise reviewable.

But the record shows (R., 63) not even a ruling upon the objection made and no exception to the admission of the evidence was, in fact, ever taken, notwithstanding the appearance of an exception in the statement of facts.

To review in this court questions relating to the admission or exclusion of evidence, an exception is essential, notwithstanding the territorial statute to the effect that the rulings are deemed to be excepted to whether an exception be in fact taken or not, for, obviously, this court's jurisdiction as regulated by the act of Congress already cited, cannot be

and is not, enlarged or in any way affected by a mere territorial statute.

Apache County *vs.* Barth, 177 U. S., 538, 542.
Grayson *vs.* Lynch, 163 U. S., 468, 473.
Eagle Mining Company *vs.* Hamilton, 218 U. S., 513, 515.
Young *vs.* Amy, 171 U. S., 179, 183.
Gonzales *vs.* Buist, 224 U. S., 126, 130.

The second, third and fifth assignments seek to review questions relating to the admission and rejection of evidence, but the record (pages 47-48, 55, 79, 80) to which these assignments respectively relate, shows that no exception was in fact taken to any of the rulings now complained of.

The second assignment complains that evidence of the receipt of money by appellant after the commencement of the action was erroneously admitted, while assignments three and five relate to the exclusion of certain evidence offered by appellant.

But it is apparent that appellant was not prejudiced by any of these rulings, and that the undisputed evidence in support of the judgment, apart from the evidence involved in these assignments, was sufficient and ample to sustain it.

Inasmuch as this court will not consider questions which relate either to the weight or the credibility of the evidence (Title Guaranty & Surety Company *vs.* Nichols, 224 U. S., 346, 353), or which relate to the effect of certain evidence (Eagle Mining Company *vs.* Hamilton, 218 U. S., 513, 515), it is clear that these assignments present nothing for review.

But if the questions sought to be raised by assignments two, three, and five were reviewable here under proper exceptions, such a review would be profitless to the appellant, because the questions so sought to be presented are frivolous.

The eighth and ninth assignments and paragraph "*b*" of the sixth assignment all seek a review of the amount of the judgment recovered by the intervenors.

Such an inquiry would require this court to examine the record to ascertain whether the facts found are justified by the evidence. This the court will not do.

As this court said in Young *vs.* Amy, 171 U. S., 179, 185:

> "The jurisdiction of this court on such an appeal, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment."
>
> Bear Lake Irrigation Co. *vs.* Garland, 164 U. S., 1, 18, citing:
> Stringfellow *vs.* Cain, 99 U. S., 610.
> Neslin *vs.* Wells, 104 U. S., 428.
> Eilers *vs.* Boatman, 111 U. S., 350.
> Idaho & Oregon Land Co. *vs.* Bradbury, 132 U. S., 509.
> Mammoth Mining Co. *vs.* Salt Lake Machine Co., 151 U. S., 447, 450.

In the case at bar there is no assignment that the findings of fact made by the Territorial Supreme Court are defective in any specified respect or that they do not support the judgment.

The complaint under these latter assignments is that the judgment was excessive, although, as appears from the statement of facts, such judgment is clearly supported by the findings.

In the tenth assignment the claim of error is based upon the general ground that "by the law of the land" judgment ought to have been given for the appellant and against the appellees. This, of course, is too general an assignment of error to present any question for review.

Finally, we respectfully contend that the seventh assignment of error presents no question for review, because it is too general for such purpose.

It is equivalent to an assignment that a court erred in awarding judgment for the appellees, because the appellees were not entitled to such judgment without any statement showing the respect in which the judgment was erroneous.

We respectfully submit that not a single error is assigned which this court, under the limitations already discussed, has jurisdiction to consider, and that for this reason the appeal should be dismissed.

Point II.

IF THE MOTION TO DISMISS BE DENIED, THE MOTION TO AFFIRM SHOULD BE GRANTED BECAUSE THERE IS BOTH COLOR AND SUBSTANTIAL GROUND FOR THE MOTION TO DISMISS.

We believe it to be clear, from the foregoing authorities, that the motion to dismiss should be granted, but if we are in error in this respect, we respectfully contend that there is both color and substantial ground for the making of the motion, and that if it be denied, then in accordance with the usual practice of this court, the motion to affirm should be granted.

The Alaska, 130 U. S., 201, 208.
Whitney *vs.* Cook, 99 U. S., 607.
Hinckley *vs.* Morton, 103 U. S., 764.
Davies *vs.* Corbin, 113 U. S., 687.
Northern Pacific Railroad *vs.* Amato, 144 U. S., 465, 473.
Bienville Water Supply Co. *vs.* Mobile, 175 U. S., 109, 114.

The findings show that the merits, assuming they were reviewable here, involve the question upon which the ruling of this court in Ingersoll *vs.* Coram, 211 U. S., 365, is conclusive.

The appellee, Alexander, and the deceased husband of the appellee Mary E. Street, who were attorneys and partners, entered into a contingent fee agreement with the deceased husband of the appellant Belle J. Barnes, who was also an attorney, whereby Barnes agreed that Alexander and Street should have a specified proportion of his contingent fee in the proceeds of certain litigation then pending. Alexander

and Street admittedly did the work required of them, never looked to the personal credit of Barnes, but looked exclusively to the subject matter of the litigation for compensation. The appellant Belle J. Barnes, as legatee of her husband's estate and as assignee of his law partnership, admittedly received her husband's contingent fee from the proceeds of the litigation and refused to pay over to the appellees their share of it.

Upon the authority of Ingersoll *vs.* Coram, 211 U. S., 365, the court correctly held that appellees were entitled as equitable assignees to their proportionate share of the contingent fee so paid to the appellant Belle J. Barnes and her deceased husband, and rendered judgment accordingly.

This ruling is supported not only by the case cited, but by the following:

Wylie *vs.* Coxe, 56 U. S., 415; 15 How., 415; see 8 Wall., 214.
Louisville, etc., Ry. Co. *vs.* Wilson, 138 U. S., 501, 506, 507.
Walker *vs.* Brown., 165 U. S., 654, 664.
Fourth St. Bank *vs.* Yardly, 165 U. S., 634, 644.
Ketcham *vs.* St. Louis, 101 U. S., 306.
Cowdry *vs.* Galveston, 93 U. S., 352, 355.
Central R. R. *vs.* Pettus, 113 U. S., 116, 127, 128.
Sammes *vs.* Whitney, 50 Fed., 666.
Mahone *vs.* Southern Tel. Co., 33 Fed., 702; Approved in Louisville, etc. R. R. Co. *vs.* Wilson, 138 U. S. 501, 507.
Frink *vs.* McComb, 60 Fed., 486.
Smith *vs.* Young, 62 Ill., 210.
Cooke *vs.* Thresher, 51 Conn., 105.
Hoffman *vs.* Vallejo, 45 Cal., 564.
Blakey *vs.* N. Y. Life Ins., 28 Ind. App., 428.
Bogert *vs.* Adams, 8 Colo. App., 185.
Patton *vs.* Wilson, 38 Pa. St., 299.
Wilson *vs.* Seeber, 66 Atl., 909, 912.
Bank of New Hanover *vs.* Williams, 79 N. C., 136.
Gulf C. & S. F. Ry. Co. *vs.* Eldredge, 80 S. W., 556.

We therefore respectfully submit that even if the motion to dismiss be denied the motion to affirm should be granted for the reasons stated.

Point III.

IF BOTH MOTIONS BE DENIED, SINCE IT IS APPARENT THAT THE CASE IS OF SUCH A CHARACTER AS NOT TO JUSTIFY EXTENDED ARGUMENT, WE RESPECTFULLY MOVE THE TRANSFER OF THE CAUSE TO THE SUMMARY DOCKET OF THIS COURT TO THE END THAT ITS DETERMINATION MAY BE EXPEDITED.

Respectfully submitted,

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SUPREME COURT

OF THE

UNITED STATES

October Term, 1912.

No. 445.

Belle J. Barnes, L. H. Manning and Epes Randolph,
Appellants.

vs.

J. L. B. Alexander and Mary E. Street, Executrix of of Webster Street, Deceased,
Appellees.

Appellants' Answer to the Motion to Dismiss the Appeal or Affirm the Judgment.

The appellees have moved under Rule VI to dismiss or affirm.

Appellants' brief is on file and the attention of the Court is invited to it upon consideration of the motion.

The motion is based upon the following proposition:

"This court has no jurisdiction to review any of the questions presented by the assignment of errors."

In support of such proposition counsel for appellees say:

> "An examination of the transcript of record and an inspection of the assignment of errors show that no question which this court has jurisdiction to consider,

is raised or presented for review. Ten errors are assigned. The first assignment and paragraph "a" of the sixth assignment question the sufficiency of the complaint in intervention, not to state a cause of action, but to entitle the interventors to intervene in the litigation."

With this statement we take issue.

The appellees claim that under a contract made by their predecessors in interest the firm of Street & Alexander with the firm of Barnes & Martin, the firm of Street & Alexander became not the creditors of the firm of Barnes & Martin but the owners of a one-third interest in a certain contingent fee which Barnes & Martin had in litigation, which, at the time of such contract Barnes & Martin were conducting.

The issue is as to whether Street & Alexander, by such contract, became creditors of Barnes & Martin, or whether they became owners of one-third of such fee.

The first assignment of error is as follows:

"The Supreme Court of the Territory of Arizona erred in not sustaining the first assignment of error made by the appellant Belle J. Barnes upon appeal to the said Supreme Court, which said first assignment of error is as follows:

" 'The Court erred in overruling the demurrer of the plaintiff to amended complaint in intervention, upon the ground that the facts stated therein do not constitute a ground for intervention or show any right to intervene, for the reason that it appears upon the face of said complaint in intervention that the intervenors were not the owners of and did not have any lien upon any part of the claim or demand sued upon by the plaintiff, and that said amended complaint in intervention does not show facts which would amount to an assignment either legal or equitable, of any portion of said claim or demand, but merely shows that the intervenors were creditors of the late firm of Barnes & Martin.' "

Subdivision "a" of the second assignment of error is as follows:

> "a. Because the amended complaint in intervention did not state facts sufficient to entitle the intervenors to intervene, for the reason stated in the first assignment of error."

The seventh assignment of error is as follows:

> "The said Supreme Court of the Territory of Arizona erred in holding and ruling that the facts stated in the amended complaint in intervention were sufficient to entitle the intervenors to relief against the plaintiff, and in overruling the assignment of error with respect thereto, and in not reversing the said judgment so appealed from because the said amended complaint in intervention did not state facts entitling the intervenors to any relief or judgment against the plaintiff."

We agree with counsel for appellees that this court will not review the construction or interpretation of a local territorial statute upon a mere question of practice.

It is manifest, however, from the three above mentioned assignments of error that appellants were questioning the decision of the Supreme Court of the Territory of Arizona in holding that the amended complaint in intervention stated facts sufficient to constitute an equitable assignment to the firm of Street & Alexander of any portion of the fee of Barnes & Martin or, in other words stated facts sufficient to constitute a cause of action.

If it did not state facts sufficient to constitute a cause of action, then it did not state facts sufficient to constitute a ground for intervention.

The reason assigned by appellants why the amended complaint in intervention did not state facts sufficient to constitute a ground for intervention was not founded upon the statute governing the right to intervene, but was expressly founded upon its failure to sustain facts sufficient

to constitute an assignment either legal or equitable, of any portion of the fee of Barnes & Martin.

Moreover, in their main brief appellants have made specifications of error. These specifications are permissible under rule 21. It is immaterial, if the specifications are complete, whether the assignments in the record are sufficient or not.

That the specifications in the brief are proper, see:

U. S. vs. Pena., 176 U. S., 242.
Stevenson vs. Barbour, 135 U. S. 609.
School Dist. vs. Hall, 106 U. S. 428.
Rowe vs. Phelps 152 U. S. 87.

Without reference, however, to the sufficiency of the specifications of error set forth in the brief, we fail to see how there can be any doubt as to the sufficiency of the above quoted assignment VII.

It is conceded that the claim of ownership of a part of the fee by the firm of Street & Alexander can be sustained only upon the theory advanced by appellees and accepted by the court, that the contract found amounted to an equitable assignment.

This question is squarely presented by the assignment of error number VII, and no question involving the construction of the statute governing intervention is even suggested in such assignment of error.

Assignment II attacks the ruling of the trial court and its affirmance by the Supreme Court of the Territory, permitting evidence of payment subsequent to the commencement of the suit. Assuming that the first ground urged under this assignment goes only to the construction of the statute permitting intervention, the other grounds urged thereunder, and particularly that the pleadings did not justify the admission of the evidence, save the assignment.

That such a question of pleading can be considered by this court, see:

Graham vs. Lynch, 163 U. S. 468;
Title Guaranty Co. vs. Nichols 224 U. S. 346.

It is urged against this assignment that there does not appear in the record that an exception was taken to the ruling of the court in admitting the evidence, and it is urged that such omission is fatal to the assignment even although the statement of facts expressly declares that an exception was taken.

Section 15, of Chapter 74, Laws of 1907, provides:

1. "The giving, refusing or modifying of instructions, and every part of the charge given to the jury, and all rulings, orders, and actions of the court in a case shall be *deemed excepted to* without formal exception and subject to revision by the Supreme Court, for error, without bill of exceptions."

It is urged that counsel may not rely on this statute, but are compelled formally to except to rulings on evidence, else they cannot be considered by this court. Of the several cases cited to support this contention, in but one, Anache County vs. Barth, 177 U. S. 538 was the question considered. In that case it appeared that the statute there construed, being in the main similar to the one above quoted, had been passed "subsequently to the trial of the action." In the other cases cited there is general language that a formal exception to rulings of the trial court must appear in the record else they will not be considered.

But in none of these cases was there a statute obviating the necessity of formal exception, and the language used in each of them must be considered in the light of the facts of the particular case. It is true that the Act of April 7, 1874, concerning "practice in territorial courts and appeals therefrom" requires that "rulings of the court on the admission

or rejection of evidence, when excepted to" shall be certified to this court; but this statute does not in any manner suggest that formal exceptions are necessary in territories where there is a statute similar to the one above quoted. This is particularly true where, as in this case, the statement of facts expressly declare that the rulings were excepted to. (Transcript, page 105, folio 205.)

For years it has been the practice in Arizona under such statute not to except to rulings on questions of evidence, and in none of the number of appeals from Arizona that have been considered by this court where that question might have been decided is there any intimation that formal exceptions are necessary.

The same objection is urged against assignments III and V and to this objection the same answer is made.

It is also urged, with strange inconsistency, that "It is apparent that appellant was not prejudiced by any of these rules, and that the undisputed evidence in support of the judgment, apart from the evidence involved in these assignments, was sufficient and ample to sustain it. Inasmuch as the court will not consider questions which relate either to the weight or credibility of the evidence (Title Guarantee Co. vs. Nichols, 224 U. S. 346-353) or which relate to the effect of certain evidence (Eagle Milling Co. vs. Hamilton, 218 U. S. 513-515) it is clear that these assignments present nothing for review." The three assignments so attacked (being assignments II, III., V) present rulings on questions of evidence. It is claimed by appellant that the court erred in receiving evidence of payments made after the commencement of the suit, (Assignment II) and that it erred in excluding evidence offered by appellant bearing on the vital question of the probability of the contract between Barnes and Street and Alexander having been made (Assignments III and V). If the admission of the evi-

dence of the payment was improper under the recognized rules of evidence for the reasons assigned, this court will reverse the lower court and order a new trial. The same must be said of Assignments III and V. If the evidence sought to be introduced was relevant and competent, the action of the trial court in excluding it was error.

Of course, if this court should take a view of the case making such evidence immaterial, it would not be error. Such, however, is not the case.

Since the court cannot examine the evidence to ascertain whether it supports the findings, when it finds that error has been committed in receiving or rejecting evidence, it must reverse, for it cannot say that even if the evidence improperly admitted be excluded or the evidence improperly excluded be admitted, the findings must remain the same, as this would be passing upon the sufficiency of the evidence to support such findings.

The two cases cited by counsel, to support their contention that these assignments (II, III and V) may not be considered, do not support that contention. In Eagle Mining Co. vs. Hamilton the court held itself unable to consider the assignment on rulings of evidence because of the omission of an exception to the ruling, there not appearing to be any statute of New Mexico similar to the Arizona statute. And in Globe G. & S. Co., vs. Nichols the contentions were, not that the court ruled improperly on the question of evidence, but that the evidence was insufficient as a matter of law, to go to the jury and that the question of diligence was wrongly decided by the jury. As to the assignments of error relating to the admission of evidence the court says, that the lower court held them to be insufficiently saved and not so material as to require a reversal in which this court concurred.

The rule has been repeatedly announced that on appeal to this court where it has not the power to investigate the evidence for the purpose of determining its sufficiency to support the judgment or findings attacked, the erroneous admission or rejection of evidence will be held sufficient to cause a reversal unless it appears beyond doubt that such error could not prejudice the rights of the party against whom the evidence was received or whose evidence was rejected.

Mexia vs. Oliver, 148 U. S. 664.
Smith vs. Shoemaker, 17 Wall, 630.

Nothing appears in either case to support the contention of counsel for appellees that this court may consider the effect of its decision in allowing or rejecting evidence on the findings, or may say that the error, if any, was immaterial because the findings must remain the same.

We do not consider it necessary to show on this motion how the evidence admitted or how the exclusion of evidence offered prejudiced appellant. It is enough here to show that prejudice can be predicated upon the rulings complained of. And this is apparent from what has been said.

Assignments VIII, IX and paragraph C of assignment VI attack the judgment on the ground that it is excessive. It is said by counsel for appellees "Such an inquiry would require this court to examine the record to ascertain whether the facts found are justified by the evidence. This the court will not do." And this the court is not asked to do. The question is presented by the statement of facts, and is one of law, not of the sufficiency of the evidence to support the findings or any of them. The authorities cited are not in point. (See finding XXI, p. 104, fol. 202 and finding XXII, p. 102, fol. 203).

It is therefore submitted that the assignments of error as they appear in the record are sufficient regardless of the sufficiency of the specifications of error in the brief, to confer jurisdiction on this court of this appeal, and that there is not such color of right to a dismissal as to warrant a consideration of the motion to affirm.

School Dist. of Ackley vs. Hall, 106 U. S. 428.

Nor is the appeal frivolous or taken for the purpose of delay. The appellant complains of substantial error in the rulings on evidence and in the rendition of judgment on the findings and is entitled to a full consideration upon a hearing. The jurisdictional questions raised in the motion to dismiss are manifestly without merit, and it is not complained that the appeal has been taken for the purpose of delay.

Counsel for appellant feel that the questions involved require full and complete exposition upon a regular hearing, and that nothing appears to justify placing this cause upon the summary docket.

For a discussion of the merits, from which counsel for appellant here refrain as being improper, the court is referred to appellant's brief.

It is respectfully submitted that the several motions should be denied.

EUGENE S. IVES,
Attorney for Appellants.